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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision: 24.08.2022*

\+ **W.P.(C) 4586/2012 and CM APPL. 9516/2012**

TATA POWER DELHI DISTRIBUTION LTD ..... Petitioner

Through: Mr Dhruv Mehta, Sr. Advocate with Mr Manish K. Srivastava, Mr Akhil Hasija and Mr Sagar Arora, Advocates.

versus

MCD & ORS ..... Respondents

Through: Mr V.V.Gautam with Mr Isha Vashisth, Advocates for respondent no.1.
Mr Alok Raj, Advocate for Mr Satyakam, ASC for respondents no.2 and 4.
Mr Sanjeev Mahajan, Advocate for respondent no.3.
Mr Ajay Digpaul, CGSC with Mr Kamal Digpaul and Ms Swati Kwatra, Advocates for UOI.

\+ **W.P.(C) 11127/2009 and CM APPL. 24097/2021**

BSES RAJDHANI POWER LTD. & ANR. ..... Petitioners

Through: Mr Anupam Varma with Mr Nikhil Sharma and Ms Manu Tiwari, Advocates.

versus

MUNICIPAL CORPORATION OF DELHI & ORS.

..... Respondents

Through: Mr V.V.Gautam with Mr Isha Vashisth, Advocates for respondent no.1.
Mr Sanjeev Mahajan, Advocate for respondent no.3.

Mr Ajay Digpaul, CGSC with Ms Anushree Narain, Advocate for respondent no.2.
Mr Anuj Aggarwal, ASC with Ms Ayushi Bansal, Advocate for respondent no.4.
Mr Aditya Singla, Sr. Standing Counsel with Mr Adhishwar Suri, Advocate for respondents no.2 to 6.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MS JUSTICE TARA VITASTA GANJU

RAJIV SHAKDHER, J.: (ORAL)

[Physical Hearing/Hybrid Hearing (as per request)]

1. There are two issues which arise for consideration in the above-captioned writ petitions:

(i) First, whether service tax, during the relevant period, was payable by the petitioners on maintenance of street lights.

(ii) Second, if it is held that during the relevant period, the petitioners were required to pay service tax, then whether the same, if at all, could be recovered from respondent no.1 i.e., Municipal Corporation of Delhi [in short, "MCD".]

2. We may note, at the very outset, that Mr V.V. Gautam, who appears on behalf of the respondent no.1/MCD, does not dispute the proposition that service tax, if payable, will have to be reimbursed by the recipient to the service provider i.e., the petitioners in the aforementioned writ petitions.

3. Mr Gautam, in support of his submission, that service tax on maintenance of street lights was not payable, as it was exempted under the provisions of the Finance Act, 1994, relies upon the Notification bearing no. 24/2009-S.T, dated 27.07.2009 [in short, "2009 Notification".]

4. At this juncture, it would be relevant to extract the 2009 Notification:

> *"**Notification No. 24/2009-Service Tax***
> *G.S.R. (E).-In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby **exempts the taxable service**, referred to in sub-clause (zzg) of clause (105) of section 65 of the Finance Act, 1994, **provided to any person by any other person in relation to management, maintenance or repair of roads,** from the whole of the service tax leviable thereon under section 66 of the said Finance Act."*
>
> [Emphasis is ours.]

4.1. A perusal of the aforesaid extract from the 2009 Notification would show that what is exempted from levy of service tax is service provided to any person by any other person "..in relation to management, maintenance or repair of roads...".

4.2. As would be evident, there is no explicit reference to the maintenance of street lights.

5. Mr Gautam contends that respondent no.1/MCD performs statutory functions, which are delineated in Section 42(n) and 42(o) of the Delhi Municipal Corporation Act, 1957 [in short, "the 1957 Act".]

5.1. Furthermore, in support of this very submission, our attention is drawn by Mr Gautam to Article 243W of the Constitution.

5.2. The said provision of the Constitution, *inter alia,* alludes to the powers, authority and responsibilities of municipalities.

5.3. In particular, Mr Gautam adverts to sub-clause (ii) of clause (a) of Article 243W of the Constitution.

5.4. Based on the said provision, it is emphasised that respondent no.1/MCD is empowered to perform functions and implement schemes which are entrusted to it, including those in relation to matters, listed in the Twelfth Schedule of the Constitution.

5.4.(a) The Twelfth Schedule of the Constitution, *inter alia,* refers to roads and bridges, as also public amenities including street lighting, parking lots, bus stops and public conveniences. (See items 4 and 17 of the Twelfth Schedule.)

5.5. It is, therefore, the contention of Mr Gautam that the omnibus expression "management, maintenance or repair of roads", adverted to in the 2009 Notification, as noted above, would include the functions entrusted to respondent no.1/MCD, of maintaining street lights.

6. The instant writ petitions have been pending for quite some time.

6.1. Insofar as W.P.(C) No. 11127/2009 is concerned, notice in the said writ petition was issued on 06.10.2009, while notice in W.P.(C) No. 4586/2012 was issued on 01.08.2012.

7. To be noted, at one point in time, these matters were heard by a Single Judge. On one such occasion i.e., on 15.07.2019 the Learned Single Judge passed the following order :

> *"Learned Senior Counsels / counsels for the petitioners and the respondent Corporation have relied upon two different notifications, inasmuch as Mr. Sandeep Sethi and Mr. Dhruv Mehta have relied upon a Notification No. 32/2010 dated June 22, 2010 which reads as under:*
>
> > *"G.S.R. (E) In exercise of the powers conferred by subsection (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the 'Finance Act'), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service provided to any person, by*

> *a distribution licencee, a distribution franchisee, or any other person by whatever name called, authorised to distribute power under the Electricity Act, 2003 (36 of 2003), for distribution of electricity, from the whole of service tax leviable thereon under Section 66 of the said Finance Act.*
> *2. This notification shall come into force on the date of its publication in the Official Gazette."*

On the other hand, Mr. Poddar has relied upon the Notification No. 24/2009 dated July 27, 2009 which reads as under:

> *"G.S.R. (E).- In exercise of the powers conferred by subsection (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service, referred to in sub-section (zzg) of clause (105) of section 65 of the Finance Act, 1994, provided to any person by any other person in relation to management maintenance or repair of roads, from the whole of the service tax leviable thereon under section 66 of the said Finance Act."*

From the perusal of the aforesaid notifications, it is clear that they relate to exemption of service tax in relation to distribution of power and maintenance or repair of roads, respectively.

It is not clear as to whether the aforesaid notifications shall have applicability for exemption of service tax on the maintenance of street lights on behalf of the Corporation. The Commissioner of Service Tax has filed an affidavit wherein in paras 4 to 6 the following has been stated:

> *"4. That Service tax is levied on specified taxable services and responsibility of discharge of service tax liability is cast on the service provider after charging the same to the service recipient.*
> *5. That in the present case M/s BSES Rajdhani Power Ltd. is a service provider under "Management, Maintenance or Repair Service" in respect of*

maintenance of Street lights in the area of MCD Delhi and MCD Delhi is service recipient.

6. That during the period under dispute there was no exemption to service provided by the petitioner to the service recipient being local body / Government, therefore, the service tax was correctly discharged by the petitioner."

Accordingly, I deem it appropriate that the concerned member of the Central Board of Indirect Taxes shall file an affidavit clarifying the position whether any notification has been issued by the Government exempting service tax on the maintenance of street lights. If the answer in the affirmative, he shall enclose the notification along with affidavit. He shall also clarify the date of effect of the said notification. Let an affidavit be filed within three weeks from today."

8. What is evident from the extract of the order dated 15.07.2019 is that apart from the 2009 Notification, there is also a reference to Notification No. 32 of 2010, dated 22.06.2010.

8.1. Besides this, it is also apparent upon reading the very same extract of the order dated 15.07.2019, that the Learned Single Judge, after examining the contents of the aforementioned notifications, was of the view that there was no clarity, as to whether maintenance of street lights was exempted from service tax.

8.2. According to the Learned Single Judge, the affidavit filed by the Commissioner of Service Tax did not shed much light, on this aspect.

8.3. We are told that this affidavit of the Commissioner of Service Tax is dated 09.04.2015.

8.4. It is in this backdrop, that the Learned Single Judge directed the concerned member of the Central Board of Indirect Taxes & Customs

('CBIC') to file an affidavit clarifying the position, as to whether or not the provision of service, by way of maintenance of street lights, was exempted from levy of service tax.

8.5. Consequently, an affidavit dated 24.01.2020 was filed with this Court, albeit on behalf of the Commissioner, Central Goods and Service Tax, Delhi East Commissionerate.

8.6. Although the aforementioned affidavit was not filed by the concerned member of the CBIC, the contents of the affidavit do clear the fog, in a manner of speech, *qua* the controversy at hand. Since the affidavit is short, we intend to extract the relevant portions of the said affidavit below:

> *"1. That vide order dated 15.07.2019, the Hon'ble Court was pleased to direct the concerned Member of the Central Board of Indirect Taxes to file an affidavit within three weeks clarifying the position whether the notification has been issued by the Government exempting service tax on the maintenance of street lights, if yes, to enclose a copy of the notification along with the affidavit and also to clear the date of effect of the said notification.*
>
> *2. That the Service Tax is a self assessed tax and the assessee must claim the exemption citing the benefit claimed by him. In the present case, M/s BSES Rajdhani Power Ltd or Tata Power Delhi Distribution Ltd. are service providers under Management, maintenance or repair service: in respect of maintenance of Street lights in the area of Municipal Corporation (MCD) of Delhi. The following are the exemption provisions which may be applied:-*

S.No.	*Notification*	*Provision of service Tax*	*Opinion of TRU-II*
1	*Notification No.24/2009 dated 27.07.2009*	*Exempts the taxable service, referred to in sub-clause (zzg) of clause (105) of section 65 of the Finance*	***<u>Not applicable as service by way of maintenance of</u>***

		Act, 1994, provided to any person by any other person in relation to management, maintenance or repair of roads from the whole of the service tax leviable thereon under section 66 of the said Finance Act.	***street lights provided to a local authority is not a service in relation to management maintenance or repair of roads.***
2	*Notification No.32/2010 dated 22.06.2010*	*Exempts the taxable service provided to any person, by a distribution licensee, a distribution franchisee, or any other person by whatever name called authorized to distribute power under the Electricity Act 2003 (36 of 2003), for distribution of electricity, from the whole of service tax leviable thereon under section 66 of the said Finance Act.*	***Not applicable as service by way of maintenance of street light provide to a local authority is nothing to do with distribution of electricity.***
3	*Entry 12 (a) of Notification No.25/2012 dated 20.06.2012*	*Service provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion fitting out, repair maintenance, renovation, alteration of:-* *a) a civil structure or any other original works meant predominantly for use other than for commerce, industry or any other business or*	***Not applicable as street light is not covered in the definition of original works.*** ***Advance Ruling Authority vide Ruling No. AAR/ST/09/2015 dated 28th August 2015 also observed same i.e.***

		profession. *"Original Works" means (i) all new construction;* *(ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable* *(iii) erection, commissioning or installation of plant machinery or equipment or structures, whether pre fabricated or otherwise (Notification No. 24/2012 – Service Tax, dated 6th June 2012 refers).*	***maintenance of street lights is not covered by entry no. 12A of Notification No.25/2012– Service Tax.***

*4. **That there is no exemption available for the services by way of maintenance of street lights provided to a local authority by any service provider including electricity distribution company such as BSES Rajdhani Power Ltd. or Tata Power Delhi Distribution Ltd.***

It is submitted accordingly." [Emphasis is ours.]

9. Although this affidavit was filed only in W.P.(C) No. 11127/2009, it will not impact the cause of the petitioner in W.P.(C) No. 4586/2012, as it is also mentioned in the said affidavit.

9.1. Given this position, it is quite evident that as far as the Service Tax Department is concerned, during the relevant period, the service provided by the petitioners was not exempted from service tax.

9.2. In other words, service tax was leviable on maintenance of street lights, contrary to the stand taken by respondent no.1/MCD.

10. Interestingly, respondent no.1/MCD had also sought a clarification from the Central Board of Excise and Customs, as to whether the exemption from service tax was available, *vis-à-vis* maintenance of street lights. The clarification sought, however, did not reap beneficial results for respondent no.1/MCD. The same is evident upon a perusal of the following extract taken from the affidavit filed by respondent no.1/MCD:

> *" xxx xxx xxx*
>
> *2. That the present affidavit is being filed in pursuance of the order(s) dated 19.08.2011 and 17.01.2012 passed by this Hon'ble Court. It is submitted that as stated in para No. 44 of. the counter affidavit, the MCD had not applied to the Central Govt. after the rejection order. However, it is submitted that vide letter No. 9095/CA-CUM-FA/2012 dated 16.01.2012, which came to the knowledge of the deponent afterwards than 17.01.2012, through CA-Cum-FA, MCD, the Respondent side gave the said letter/application for exemption of service tax on maintenance of street lights with the Director (Service Tax), Central Board of Excise and Customs, North Block, New Delhi. However, no response to the same has been received till date by the said office of MCD.*
>
> *xxx xxx xxx "*

11. Mr Gautam's contention that the 2009 Notification or the 2010 Notification should be read to include maintenance of street lights does not impress us. It is well-established that an exemption notification has to be read strictly. It does not warrant for inclusion of a service, which is not provided therein.

11.1. In this behalf, reference may be made to ***Commissioner of Customs (Import), Mumbai v. Dilip Kumar and Company and Ors.***, (2018) 9 SCC 1. For the sake of convenience, the relevant part of the said judgment is extracted hereafter:

> *"66. To sum up, we answer the reference holding as under:*
> *66.1 Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.*
> *66.2 When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the Revenue.*
> *66.3 The ratio in Sun Export case is not correct and all the decisions which took similar view as in Sun Export case stand overruled."*

11.2. Also see the following judgments: ***Krishi Upaj Mandi Samiti, New Mandi Yard, Alwar v. Commissioner of Central Excise and Service Tax, Alwar,*** (2022) 5 SCC 62*;* ***Commissioner of Customs, Bangalore v. GE BE Ltd. and Anr.,*** (2016) 15 SCC 733*;* ***Commissioner of Customs (Preventive), Mumbai v. M. Ambalal and Company,*** (2011) 2 SCC 74 ***and State of Jharkhand and Ors. v. Tata Cummins Ltd. and Anr.,*** (2006) 4 SCC 57.

12. It is, however, Mr Gautam's contention that roads cannot be maintained or repaired unless the street lights are maintained.

12.1. To our minds, while the argument, at first blush, is attractive, it does not help the cause of respondent no.1/MCD, as we are dealing with an issue involving a claim for exemption from levy of tax. The aphorism that "tax knows no equity", generally holds good. There is no reason why it should not apply in this case as well.

12.2. This contention of Mr Gautam, thus, cannot be accepted.

13. Therefore, insofar as the first issue, as noted in paragraph 1 above, is concerned, it has to be decided in favour of the petitioners, which is that, during the relevant period, there was no exemption available from the

payment of service tax, concerning the maintenance of street lights.

14. Insofar as the second issue is concerned, it can be decided based on an admitted fact, which is, that the petitioners have paid service tax, during the relevant period. The logical sequitur would be that the petitioners would have to be reimbursed the service tax that they have paid, since the recipient would have to bear the ultimate burden of the payments in that behalf.

14.1. We may note that Mr Dhruv Mehta, learned senior counsel, in support of this plea, which is, that the ultimate burden rests on the recipient, has relied upon the judgment of the Learned Single Judge of this Court in ***Pearey Lal Bhawan Association v. Satya Developers Pvt. Ltd.***, ILR (2011) 1 Delhi 604.

14.2. The aforementioned judgment of the Learned Single Judge has been affirmed by the Division Bench in ***Satya Developers Pvt. Ltd. v. Pearey Lal Bhawan Association*** dated 13.10.2015, passed in RFA(OS) 24-25/2011.

15. As indicated at the very outset, Mr Mehta's submission that the recipient will have to be burdened with the service tax liability, if it is found, that there was no exemption operating in the relevant period, is, in any event, not contested by Mr Gautam.

16. Thus, for the foregoing reasons, we are inclined to hold as follows:

(i) During the relevant period, there was no exemption operating *qua* the payment of service tax on the maintenance of street lights.

(ii) The petitioners, rightly, paid the service tax as a service provider in the first instance.

(iii) Since service tax has been paid by the petitioners, respondent no.1/MCD, being the recipient of the service, will have to bear the burden and consequently reimburse the same.

16.1 The writ petitions are disposed of, in the aforesaid terms.

17. Needless to state, the monies paid by the petitioners towards service tax will be reimbursed to the petitioners expeditiously.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

AUGUST 24, 2022/tr